APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2266

Summary Calendar*

WALTER V. MEDENICA a/k/a VOJESLAV MEDENICA,
Plaintiff-Appellant,

v.

HOWARD H. CALLAWAY, Secretary of the United States Army, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Alabama

(August 27, 1974)

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

[Filed in Clerk's Office
Northern District of Alabama
March 22, 1974
William E. Davis
Clerk, U.S. District Court
By: _____
Deputy Clerk]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
NORTHEASTERN DIVISION

Civil Action No. 73-L-1152

WALTER V. MEDENICA, *Plaintiff*
v.
HOWARD H. CALLAWAY, ET AL., *Defendants*

Memorandum Opinion

This cause is before the Court on cross motions for summary judgment. Although the plaintiff invokes 28 U.S.C. § 2201, and 5 U.S.C. § 702, the Court construes this action to be a complaint brought under 28 U.S.C. § 1361 and finds it has subject matter jurisdiction within the limited confines of that statute. The Court is additionally guided by the procedural provisions of 5 U.S.C. § 701, *et seq.*, of the Administrative Procedure Act, and 10 U.S.C. § 1552(a). *Ashe* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965).

The material facts are not in dispute. The plaintiff, a National Aeronautics and Space Administration (NASA) civil servant (GS-14/7 level), seeks to compel the Secretaries of the Army and Air Force to grant a prior enlistment recognition under 10 U.S.C. § 3254, which would result in the award of "veteran preference status." The Air Force Board for the Correction of Military Records, hereinafter referred to as SAFCB, declined to grant the plaintiff prior enlistment recognition in a petition brought under 28 U.S.C. § 1552 to "correct an error or remove an

injustice." Whether such declination by the SAFCB is to be upheld is the question presented for this Court's very limited review.

Plaintiff claims that in June, 1945, as a Yugoslav refugee in France, he volunteered to join, and was accepted, as an enlistee in the 81st Airdrome Squadron, United States Army Air Force (AAF), and was treated as, and performed the duties of, an enlisted man until February, March or April, 1946, when the 81st Airdrome Squadron terminated operations in Europe. Remaining in Europe (West Germany) until 1952, plaintiff then immigrated to the United States where he was naturalized in 1957. Plaintiff asserts that his purported enlistment was made pursuant to 10 U.S.C. § 3254, which provides for temporary enlistments for non-U.S. citizens during time of war or emergency. In his application, plaintiff has submitted a facsimile of a purported pass issued to him, and photographs taken of him in uniform during his term with the 81st Airdrome Squadron, as well as affidavits by people associated with during his alleged enlistment. These same exhibits were submitted in support of his SAFCB application, which was denied on November 19, 1973.

Prior to the SAFCB determination, plaintiff was unsuccessful in four other attempts to obtain veteran preference status. By letter of January 26, 1971, NASA advised plaintiff that his January 17, 1971, petition could not be granted because he had failed to submit documentation proving active duty or separation from the military. The Board of Appeals and Review of the Civil Service Commission also denied plaintiff's request for the same reasons by letter of March 25, 1971. Plaintiff's November 3, 1972, petition to the Adjutant General of the U.S. Army was responded to by the Chief of Army Reference Branch of the National Personnel Records Center, St. Louis, Missouri, stating his inability to identify a record of plain-

tiff's service with AAF. Plaintiff's fourth attempt came in a January 4, 1973, suit against the Secretary of the Army. This action resulted in a January, 1973, order of this Court dismissing the suit without prejudice, to allow plaintiff to first exhaust his administrative remedies by petitioning the Board for the Correction of Military Records. The SAFCB denial of November 19, 1973, immediately preceded institution of the action *sub judice.*

At the outset, it should be noted that although sovereign immunity protects the U.S. Army and U.S. Air Force from suit by plaintiff, cf. *Blackmar* v. *Guerre,* 342 U.S. 512, 72 S. Ct. 410, 96 L.Ed. 534 (1972), subject matter jurisdiction over the respective Secretaries is permitted under 28 U.S.C. § 1361 to review ministerial acts and procedures effected pursuant to 10 U.S.C. § 1552(a) and 5 U.S.C. § 701, *et seq. Ashe* v. *McNamara, supra.*

It is within the narrow scope of review provided by 28 U.S.C. § 1361 that the Court inquires into the acts of the SAFCB. The jurisdiction invested in the district courts by this section is simply to scrutinize:

> "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The legislative history of Section 1361 reveals that the purpose of this section is "not to direct or influence the exercise of discretion of the officer or agency in making the decision." *1962 Code Cong. & Ad. News,* at 2784-85 (87th Cong. 2d Sess.). Moreover, it is a settled principle of administrative law that personnel decisions by agencies are discretionary acts that preclude mandamus, unless the agency is shown to have acted arbitrarily, capriciously or without substantial compliance with agency regulations. *Armstrong* v. *U.S.,* 405 F.2d 1275 (Ct. Cl. 1969), *cert. denied,* 395 U.S. 934 (1969). More specifically, the District

Court in *Denton* v. *Samans*, 315 F. Supp. 279 (N.D. Cal. 1970), aff'd 483 F.2d 21 (9th Cir. 1973), stated:

> "No judicial relief is available from action of the Board for the Correction of Military Records concerning the correction of discharge errors or injustices, absent a showing that the action was unsupported by substantial evidence."

To warrant the substitution by this Court of its judgment for that of the SAFCB, the plaintiff has the burden of producing cogent and clearly convincing evidence to prove the Board's decision was "arbitrary, capricious or erroneous in law." *Wood* v. *U.S.*, 176 Ct. Cl. 737, 743 (1966).

Having considered the briefs of counsel and the certified record of proceedings before the SAFCB, the Court concludes that plaintiff has failed to show any evidence of arbitrariness or capriciousness on the part of the SAFCB. Moreover, this Court agrees with the Board that there was insufficient evidence presented by the plaintiff to support an enlistment under 10 U.S.C. § 3254.

For the foregoing reasons, the defendants' motion for summary judgment is granted and the plaintiff's motion for summary judgment is denied. A separate order will be entered.

DONE this 22nd day of March, 1974.

/s/ SEYBOURN H. LYNNE
Senior Judge

[Filed in Clerk's Office
Northern District of Alabama
March 22, 1974
William E. Davis
Clerk, U.S. District Court
By: _____
Deputy Clerk]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
NORTHEASTERN DIVISION

Civil Action No. 73-L-1152

WALTER V. MEDENICA, *Plaintiff*

v.

HOWARD H. CALLAWAY, ET AL., *Defendants*

Order

In conformity with and pursuant to the Memorandum Opinion contemporaneously filed herewith,

It is ORDERED, ADJUDGED and DECREED by the Court that defendants' motion for summary judgment is hereby granted, and plaintiff's motion for summary judgment is hereby denied.

It is further ORDERED by the Court that this case be and the same is hereby dismissed, with prejudice, with costs taxed against the plaintiff.

DONE this 22nd day of March, 1974.

/s/ SEYBOURN H. LYNNE
Seybourn H. Lynne
Senior Judge

DEPARTMENT OF THE AIR FORCE
WASHINGTON 20330

OFFICE OF THE ASSISTANT SECRETARY

SAFCB 73-2828

19 November 73

Dear Mr. Medenica:

Reference is made to your request for correction of your military records under the provisions of Section 1552, Title 10, United States Code (70A Stat 116).

The administrative regulations and procedures established by the Secretary of the Air Force for the guidance of the Board provides that an application may be denied where the applicant has not submitted sufficient evidence to establish a showing of probable error or injustice in the case.

I regret to advise you that a careful consideration by the Board of your military record, together with such facts as have been presented by you, fails to establish a showing of probable error or injustice in your case. However, you are privileged to submit new and material evidence for the consideration of the Board. In the absence of such additional evidence tending to show the commission of an error or injustice, no further action on your application is contemplated.

BY DIRECTION OF THE CHAIRMAN:

/s/ M. T. MARTIN
M. T. Martin
Executive Secretary
Air Force Board for the
Correction of Military Records

Mr. Walter V. Medenica
c/o D. J. Schrader, Esquire
Suite 400
State National Bank Bldg.
Huntsville, Alabama 35801

EXHIBIT "B"